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IN THE  
**Supreme Court of the United States**

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October Term 1965

No. 658

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ARMANDO SCHMERBER,

*Petitioner,*

*vs.*

THE STATE OF CALIFORNIA,

*Respondent.*

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**BRIEF OF RESPONDENT.**

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**Reference to Official Reports.**

The trial court issued no formal opinion. The Appellate Department of the Superior Court affirmed the judgment without formal opinion.

**Jurisdiction.**

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Section 1257(3).

**Constitutional and Statutory Provisions  
Involved in the Case.**

The case involves the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; Article I, Section 13 of the California Constitution, and Sections 23101 and 23102 of the California Vehicle Code.

### Statement of the Case.

Petitioner was charged in a verified complaint, filed in the Municipal Court of the Los Angeles Judicial District, with having committed, on November 13, 1964, violations of Sections 23102(a) and 12951 of the Vehicle Code of the State of California, misdemeanors. The complaint charged that the petitioner had been convicted previously, on February 23, 1962, of having violated California Vehicle Code Section 23102. That statute reads as follows:

23102. (a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars (\$250) nor more than five hundred dollars (\$500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars (\$250) nor more than one thousand dollars (\$1,000). A conviction under this section shall be deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted proba-

tion, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars (\$250) but not more than one thousand dollars (\$1,000).

Petitioner was duly arraigned, entered a plea of not guilty and requested a jury trial. Prior to trial petitioner made a motion to suppress the evidence of the blood sample. The trial court indicated that it would deny the motion. [Tr. p. 31.] Count II was dismissed before the trial began. The cause proceeded to trial, during which the court overruled an objection to the admissibility of the blood sample. [Tr. p. 94.] The prosecution's case in the Municipal Court of Los Angeles Judicial District was presented as follows:

Lowell Eaker testified that, on November 13, 1964, at approximately 10 P.M., he met the petitioner at the A J Tavern where they played one game of pool and had two beers. [Tr. p. 35.] The men left the tavern and went to the Tarzana Bowling Alley where they each had one drink of whiskey. When the two men left, the petitioner was driving in excess of the speed limit and Eaker asked him to slow down. [Tr. p. 36.] The last thing before the accident which Eaker remembered was seeing a tree coming up and a lawn and sidewalk. [Tr. p. 37.] Eaker was knocked unconscious and woke up at the hospital where he was treated. [Tr. p. 38.]

Bruce E. Davidson testified that, on November 13, 1964, at approximately 11:55 P.M., he heard skidding and then a crash. He went outside and saw a wrecked car with two men in it. [Tr. pp. 46, 48.] The petitioner was observed behind the wheel and Eaker was pinned underneath the right side of the right front seat, down

under the glove compartment. Davidson pulled Eaker out of the car and sent for an ambulance. [Tr. p. 49.]

John T. Schillo, a police officer of the City of Los Angeles, in charge of Property Transfer, West Valley Division, testified that, on November 14, 1964, at approximately 4 P.M., he found a blood sample in the Property drawer. He notified a messenger and signed a transfer slip with the name of the petitioner on it. The blood sample was in an envelope sealed with a wax seal. [Tr. pp. 60-64.]

William H. Ranlett, a police officer of the City of Los Angeles, assigned to Central Property Division, testified that on November 14, 1964, it was his duty to check in evidence and property. The prisoner property transfer record was received in evidence. [Tr. p. 65.]

Edward A. Slattery, a police officer of the City of Los Angeles, testified that, on November 13, 1964, at approximately 12 o'clock midnight, he received a radio call regarding an accident and proceeded to the location. [Tr. p. 66.] Upon arriving at the scene, he observed that Eaker was already in the ambulance and petitioner was being placed in the ambulance. [Tr. p. 102.] The officer observed petitioner's face at this time and noted that his eyes were bloodshot and watery and had a glassy appearance, and an odor of alcohol was on his breath. [Tr. p. 68.]

When Officer Slattery first saw the car the petitioner had been driving, it was on the lawn in front of a house with a tree draped over the back. [Tr. p. 67.] After his investigation and considering the direction in which the tree was knocked over, the direction the car was facing, and the location of the tire marks where the car hit the curb, the officer testified that the car

had been driven on the wrong side of the street. [Tr. p. 86.]

Eaker told Officer Slattery that petitioner was the driver of the vehicle. [Tr. p. 82.] A Mr. Yellin had told the officer that when he approached the vehicle Eaker was down on the floorboard on the right hand side, and petitioner was lying in a position that appeared to be on top of Eaker. [Tr. p. 85.]

At the hospital Officer Slattery observed that petitioner's eyes had a glassy appearance and were watery and bloodshot. [Tr. pp. 69, 73.] His speech was slightly slurred and he was slow in talking. The officer formed the opinion that petitioner was under the influence of an alcoholic beverage. [Tr. p. 69.] Petitioner was arrested at the hospital for a violation of California Vehicle Code Section 23101<sup>1</sup> and was informed that he was under arrest; that he was entitled to the services of an attorney; that he could remain silent, and that anything he told the officer could be used against him. [Tr. p. 69.] Petitioner told the officer he understood his rights. [Tr. p. 73.]

Officer Slattery asked petitioner if he would take a Breathalyzer test, which he refused. [Tr. p. 96.] Petitioner was asked if he had any objection to the taking of a blood sample and he replied that he did not. [Tr. p. 87.] When the doctor was prepared to withdraw the blood, petitioner objected. He said he didn't think he should do it as his attorney had advised him not to. Petitioner stated he would not fight the taking of the blood

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<sup>1</sup>Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person other than himself is guilty of a felony . . .

because Slattery had told him that, even if the blood was taken it would be indicated in the report that petitioner had objected and had not used any physical force in his objection. [Tr. p. 88.]

It was stipulated that a blood sample was taken from the veins of the petitioner by a Dr. Brooks under standard medical procedures at the Encino Hospital. [Tr. p. 98.] No one held petitioner at the time the blood was extracted. [Tr. p. 89.] The officer testified that the blood sample was put into a glass vial which was put into an envelope sealed with sealing wax and put into a locked drawer at West Valley Police Station. [Tr. p. 99.]

Petitioner told the officer that he had not been driving the car [Tr. p. 95]; that he had not been in any accident, and that the injuries he had were from a beating he received while he was hitchhiking. [Tr. p. 96.]

Thomas E. Buell, a police officer of the City of Los Angeles, testified that, on November 14, 1964, he investigated the accident. He stated that from the way petitioner walked and acted, he was able to form the opinion that petitioner was well under the influence of an alcoholic beverage. [Tr. p. 116.]

Mrs. Geraldine Lambert, a police chemist for the City of Los Angeles, testified that she made an analysis of the blood sample which showed a blood alcohol reading of .18. [Tr. p. 127.] That in her opinion an individual with this reading would be under the influence of intoxicating liquor. [Tr. p. 130.] She further testified that an individual with a reading of .18 percent blood alcohol would have approximately 13 and one-half ounces of 86-proof alcohol in his body fluids. [Tr. p. 132.] The blood sample was received in evidence. [Tr. p. 142.] This concluded the case for the prosecution.

The only witness for the defense was the petitioner himself. He testified that he was not driving the car just prior to the accident because he was in the back seat. [Tr. p. 148.] Petitioner also denied that he was under the influence of intoxicating liquor on the night of November 13, 1964. [Tr. p. 152.]

A verdict of guilty was returned. [Tr. p. 159.] Petitioner was granted probation on condition he serve the first 30 days of the probationary period in jail and pay a fine of \$250.00.

An appeal was taken from the order granting probation to the Appellate Department of the Superior Court for the County of Los Angeles. Briefs were filed, oral argument presented, and the matter submitted. The order granting probation was affirmed [Tr. p. 163], and a subsequent petition for rehearing or certification to the District Court of Appeal was denied. [Tr. pp. 165-166.]

### **Summary of Argument.**

The arrest of petitioner for a violation of Section 23101 of the California Vehicle Code was based on probable cause. Incident to the lawful arrest, the police officers had a right to search for evidence.

Taking a blood sample from petitioner over his objection, without force, in a medically approved manner, did not constitute an unreasonable search or a denial of due process of law.

The blood sample received in evidence is not a violation of the Fifth Amendment privilege against self-incrimination, as the privilege relates to testimonial compulsion and not to real evidence.

Taking the blood sample from petitioner after advising him of his right to counsel was not a denial of the right to counsel.

## ARGUMENT.

### I.

#### The Arrest Was Legal.

A peace officer may, without a warrant, arrest a person whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

California Penal Code Section 836.3.

Reasonable or probable cause for a peace officer to arrest a person without a warrant is shown where a man of ordinary care and prudence would be led to believe and conscientiously entertain an honest and strong suspicion that the accused is guilty. (*People v. Cockrell*, 63 A.C. 691, 697, 47 Cal. Rptr. 788.) In determining whether the arresting officer had reasonable cause, the court must look to the facts and circumstances presented to the officer at the time he was required to act. (*Draper v. United States*, 358 U.S. 307, 313, 3 L. Ed. 2d 327, 332.)

Officer Slattery had information from Eaker and Yellin that petitioner was the driver of the car involved in an accident. There was suspicion of an injury, as Eaker had been taken to the hospital in an ambulance. From his investigation the officer determined that petitioner had been driving on the wrong side of the street, an act forbidden by law, and neglecting a duty imposed by law to drive on the correct side of the street.

From these facts, respondent contends that the officer had probable cause to believe a felony had occurred, a violation of California Vehicle Code Section 23101, and thus could arrest the petitioner whether or not a felony had in fact been committed. The arrest was legal.

Petitioner's affidavit [Tr. p. 20] states the blood sample was taken prior to his arrest. While the prosecution did not controvert petitioner's affidavit at the hearing on the motion to suppress [Tr. p. 30], the evidence presented at trial showed the arrest was made before the extraction of the blood. [Tr. pp. 69, 75, 84.] Petitioner's testimony made no reference to the time of his arrest in relation to the taking of the blood sample.

## II.

### Taking a Blood Sample Was a Reasonable Search Incident to a Lawful Arrest.

As incident to a lawful arrest, police officers may make a reasonable search. (*United States v. Rabinowitz*, 339 U.S. 56, 57, 94 L. Ed. 653, 655; *Ker v. California*, 374 U.S. 24, 34, 10 L. Ed. 2d 726, 738; *People v. Duroncelay*, 48 Cal. 2d 766, 771, 312 P. 2d 690; *People v. Lane*, 240 A.C.A. 700, 705, 49 Cal. Rptr. 712.)

The trial court determined that the taking of the blood sample was a reasonable search [Tr. p. 94] incident to a lawful arrest. [Tr. p. 92.] (*Mapp v. Ohio*, 367 U.S. 643, 653, 6 L. Ed. 2d 1081, 1089.)

The taking of a blood sample in a medically approved manner does not offend "a sense of justice" (*Brown v. Mississippi*, 297 U.S. 278, 80 L. Ed. 682), nor does it constitute brutality, or shock the conscience, or deprive petitioner of due process of law under the rule applied in *Rochin v. California*, 342 U.S. 165, 96 L. Ed. 183. (*Breithaupt v. Abram*, 352 U.S. 432, 435, 1 L. Ed. 2d 448, 450; *People v. Huber*, 232 Cal. App. 2d 663, 672, 43 Cal. Rptr. 65; *People v. Duroncelay*, *supra*; *People v. Lane*, *supra*.)

Petitioner states that *Breithaupt* is support for the police to invade person's bodies. The case of *State v. Cram*, 176 Ore. 577, 160 P. 2d 283, referred to by petitioner and decided twelve years before *Breithaupt*, was cited as authority in *Breithaupt*. (1 L. Ed. 2d 448, 452.) *Cram* was factually the same as *Breithaupt*.

Petitioner has referred to *State v. Berg*, 76 Ariz. 96, 259 P. 2d 261, decided four years before *Breithaupt*. The *Berg* case, involving a use of force to obtain a breath sample, was overruled in *State v. Pina*, 94 Ariz. 243, 383 P. 2d 167, insofar as it justified an unreasonable search.

A search of an individual's rectum in a medically approved manner does not constitute an unreasonable search. (*Blackford v. United States*, 247 F. 2d 745; *Denton v. United States*, 310 F. 2d 129.) Giving an emetic to a suspect to cause him to regurgitate something he has swallowed does not constitute an unreasonable search. (*Barrera v. United States*, 276 F. 2d 654; *Lane v. United States*, 321 F. 2d 573.)

A state may constitutionally require the taking of a blood alcohol test as a prerequisite to the privilege of using the roads. (*Walton v. City of Roanoke*, 204 Va. 678, 133 S.E. 2d 315; *Lee v. State*, 187 Kan. 566, 358 P. 2d 765; *State v. Bock*, 80 Idaho 296, 328 P. 2d 1065; *Prucha v. Dept. of Motor Vehicles*, 172 Neb. 415, 110 N.W. 2d 75.)

The efficacy of a blood test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time. (*In re Martin*, 58 Cal. 2d 509, 512, 374 P. 2d 801.) Alcoholic content in the blood furnishes a scientific method of determining the extent of

the influence of liquor upon a person, and chemical analysis of the blood itself is a scientifically accurate method of ascertaining that content. (*State v. Johnson*, 42 N.J. 146, 199 A. 2d 809, 821.) A blood alcohol test protects one who has the odor of alcohol on his breath but has not been drinking to excess and one whose conduct may create the appearance of intoxication when he is suffering from some physical condition over which he has no control. A blood alcohol test may serve to exonerate as well as convict. (*People v. Bellah*, 237 A.C.A. 127, 134, 46 Cal. Rptr. 598; *Breithaupt*, *supra*.)

When the blood sample was taken from petitioner, no force was used. The sample was taken pursuant to standard medical practices. Extraction of blood for testing purposes is an experience which millions of Americans submit to daily without hardship or ill-effects. Taking of a blood sample in the light of the imperative public interest involved does not constitute an unreasonable search and is therefore not a denial of due process.

The absence of consent does not render the taking of the blood sample a violation of a constitutional right. The test administered to petitioner would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience from the fabric of acceptable conduct. It is on this bedrock that the concept of due process has been established. The blood test procedure has become routine in our daily lives.

Taking the blood sample without any force pursuant to standard medical procedure was not a return to the "rack and the screw," but rather was a reasonable search incident to a lawful arrest, which was not a denial of due process.

### III.

#### **Taking a Blood Sample Does Not Constitute a Violation of the Privilege Against Self-Incrimination.**

In *Holt v. United States*, 218 U.S. 243, 252, 54 L. Ed. 1021, 1030, this court held that the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence.

After the petitioner was lawfully placed under arrest, there was no impropriety but it was in accordance with the duty of the officers to make a search for evidence relevant to the commission of the crime. The blood sample obtained constituted real evidence and is therefore outside the scope of the privilege against self-incrimination.

The privilege against self-incrimination had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons in the late Seventeenth Century. What was a rule of evidence in England became a constitutional enactment in the United States. (*Brown v. Walker*, 161 U.S. 591, 596, 40 L. Ed. 819, 821.) The object of the constitutional privilege against self-incrimination is the employment of legal process to extract from an accused's own lips an admission of his guilt, which will thus take the place of other evidence. It is not merely any and every com-

pulsion that is the kernel of the privilege in history and in constitutional definitions, but testimonial compulsion. (*People v. Haeussler*, 41 Cal. 2d 252, 257, 260 P. 2d 8; *People v. Fuller*, 236 Cal. App. 2d 889, 894, 46 Cal. Rptr. 435; *People v. Lane*, *supra*.)

The privilege relates only to a compulsory oral examination, or the equivalent thereof, of an accused person either before or at trial. The privilege against self-incrimination never had, nor was it intended to have, an application to the removal of real evidence from the person of an accused. (*Blackford v. United States*, *supra*.) The privilege is limited to testimonial compulsion.

Certain types of examination or inspection are outside the scope of the privilege against self-incrimination because they are non-testimonial in character. Included in these are voice identification (*State v. King*, 44 N.J. 346, 357, 209 A. 2d 110, 116); fingerprinting (*United States v. Kelly*, 55 F. 2d 67, 68; *Gage v. State*, 387 S.W. 2d 679); X-ray photos (*State v. Campbell*, 405 P. 2d 978); photographs (*Williams v. State*, 395 S.W. 2d 834); a police "show-up" (*People v. Lopes*, 60 Cal. 2d 223, 241, 384 P. 2d 16; *People v. Gilbert*, *supra*, 741); the results of an intoximeter test (*People v. Sykes*, 238 A.C.A. 190, 192, 47 Cal. Rptr. 596; a request to a defendant to put on eyeglasses during a trial (*People v. Tomaszek*, 54 Ill. App. 2d 254, 204 N.E. 2d 30), and a request to a defendant at trial to stand so a victim could identify him. (*State v. Carcerano*, 390 P. 2d 923.)

Removal of heroin inclosed in a rubber sheath from a defendant's rectum by a medical doctor (*Blackford v. United States*, *supra*; *Murgia v. United States*, 285 F.

2d 14), or putting a hand on defendant's throat causing him to spit out balloons containing heroin which he attempted to swallow (*People v. Mora*, 238 A.C.A. 1, 4, 47 Cal. Rptr. 338), does not violate the privilege against self-incrimination.

A blood sample taken from an individual is real evidence and does not violate the privilege against self-incrimination as that privilege is limited to testimonial compulsion. (*People v. Lane*, *supra*; *State v. Blair*, 45 N.J. 43, 211 A. 2d 196, 198; *Walton v. Roanoke*, *supra*; *Commonwealth v. Tanchyn*, 200 Pa. Supp. 148, 188 A. 2d 824; *Duroncelay*, *supra*; *Breithaupt*, *supra*.)

Respondent contends there is no substantial difference between a blood sample, a fingerprint, a photograph, or an actual view of the accused. None of these constitutes testimonial compulsion since they are examples of real evidence and thus do not violate the self-incrimination privilege.

Evidence consisting of a blood sample taken from the petitioner is not obtained by testimonial compulsion. It is not a communication from the petitioner but is real evidence of the ultimate fact in issue—the petitioner's physical condition.

*Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, is not in point. That case is limited to the comment on the failure of a defendant to testify at trial. Petitioner did testify at his trial; therefore *Griffin* is not applicable. (*People v. Sykes*, *supra*.)

A person under lawful arrest does not have any constitutional right under California Constitution, Article I, Section 13, giving a privilege against self-incrimination, to decline a blood alcohol test, properly adminis-

tered, and no federal constitutional right is violated by requiring him to submit to such a test.

*People v. Conterno*, 170 Cal. App. 2d Supp. 817, 827, 339 P. 2d 968.

Petitioner refused to take a Breathalyzer test. The breath method of determining the amount of alcohol in the blood "has the advantage of prompt and easy administration by non-medically trained personnel and with relatively inexpensive equipment." The Breathalyzer is one of the devices that "are now generally scientifically recognized as sufficiently reliable." (*State v. Johnson*, *supra*.)

Petitioner did not take the Breathalyzer test. The jury instruction referred to in petitioner's brief was not given at his trial. However, the admission into evidence of a refusal to take a blood alcohol test is not error and does not violate the privilege against self-incrimination. (*Dayton v. Allen*, 200 N.E. 2d 356, 366; *State v. Durrant*, 188 A. 2d 526; *State v. Smith*, 230 S.C. 164, 94 S.E. 2d 886, 890; *State v. Benson*, 230 Iowa 1168, 300 N.W. 275; *Gardner v. Commonwealth*, 195 Va. 845, 81 S.E. 2d 614; *Conterno*, *supra*; *People v. Zavala*, 239 A.C.A. 810, 818, 49 Cal. Rptr. 129.) An accused who testifies, subjects to comment and inference his omission to explain circumstances and events already in evidence. (*Caminetti v. United States*, 242 U.S. 470, 61 L. Ed. 442; *Johnson v. United States*, 318 U.S. 189, 87 L. Ed. 704.)

The introduction of the blood sample into evidence and testimony regarding the refusal to take the blood alcohol test, do not violate the privilege against self-incrimination.

IV.

**Taking the Blood Sample Does Not Constitute a Denial of Right to Counsel.**

Police officers have the right to have a blood sample extracted in a medically approved manner. (*Breithaupt, supra.*) If the police have this right, then the taking of the blood in a medically approved manner is not a denial of the right to counsel.

In a recent case involving handwriting exemplars, *People v. Graves*, 64 A.C. 216, 49 Cal. Rptr. 386, the California Supreme Court pointed out that not every aid that a defendant or suspect is required to give the prosecution violates the privilege against self-incrimination or a denial of the right to counsel. The court stated on page 218, that

"The right to counsel during police interrogation established in *Escobedo v. Illinois* [378 U.S. 478, 12 L. ed. 2d 977], is designed to prevent the rise of coercive practices to extort confessions or other incriminating statements. It does not protect a defendant from revealing evidence against himself in other ways. It applies only when 'the police carry out a process of interrogation that lends itself to eliciting incriminating statements.' . . . Accordingly, we find no support in *Escobedo* for invoking the right to counsel to block scientific crime investigation. Reliance on handwriting exemplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude the police from asking for such exemplars would foster reliance instead on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect." (Emphasis added.)

The same reasons given by the court in affirming the judgment of conviction wherein exemplars were taken and used applies to the case at bar for the taking of blood for scientific investigation to determine the condition of a driver. The rule of *Escobedo* and *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, is applicable to incriminating statements of an accused, and not to real evidence obtained in a search incident to a lawful arrest. (See: *People v. Lane*, *supra*.)

**Conclusion.**

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles should be affirmed.

Respectfully submitted,

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